

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS**  
**Stella B. Werner Council Office Building**  
**Rockville, Maryland 20850**  
**(240) 777-6660**

**IN THE MATTER OF:**  
**PARKVIEW AT ASPEN HILL, LLLP**  
Applicant

Ivy Dench-Carter  
Todd Reddan  
Kevin Foster  
Judith Miller  
Christopher Kabatt

For the Application  
Patricia Harris, Esquire  
Attorney for the Applicant

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OZAH Case No. CU 17-04

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Before: Martin L. Grossman, Hearing Examiner  
Director, Office of Zoning and Administrative Hearings

**OPINION AND ORDER ADMINISTRATIVELY APPROVING A MINOR  
AMENDMENT TO CONDITIONAL USE CU 17-04**

**I. Background**

Conditional Use CU 17-04 was granted by the Hearing Examiner January 5, 2017, to permit the Applicant, Parkview at Aspen Hill, LLLP (hereinafter “Applicant” or “Parkview”)<sup>1</sup> to establish an Independent Living Facility for Seniors or Persons with Disabilities, consisting of 120 dwelling units at 3132 Bel Pre Road, in the Aspen Hill area of Silver Spring.

The subject site consists of a 5.68 acre property (247,256 square feet), identified as part of Parcel P776 on Tax Map HR 53. It is located approximately 1,300 feet east of the intersection of Bel Pre Road and Connecticut Avenue. The property is in the RE-2 Zone and is subject to the 1994 Aspen Hill Master Plan. The property is owned by Potomac Conference Corporation of

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<sup>1</sup> Parkview at Aspen Hill, LLLP is a joint venture composed of Pennrose GP, LLC; Pennrose LP, LLC; and Shelter Development, LLC. It will be succeeded in ownership by Park View at Aspen Hill LLC, in which the Montgomery County Housing Opportunities Commission ("HOC") will have a tiny ownership interest. Exhibits 40 and 45.

Seventh Day Adventists (Tax ID No. 13-00975824), which authorized the conditional use application. Exhibit 12.

On November 16, 2016, Technical Staff of the Montgomery County Planning Department issued a report, recommending approval of the application, based on amended plans and subject to 10 proposed conditions. Exhibit 28.

The Montgomery County Planning Board met on December 1, 2016, and unanimously recommended approval of the application, but with a modified lot design. Exhibit 29, p. 1. The Planning Board also approved the Preliminary Forest Conservation Plan (No. CU 17-04) and the tree variance associated with the application. Exhibit 29.

The December 16, 2016, public hearing proceeded as scheduled, and the record closed, as scheduled, on January 18, 2017. Based on the entire record, the Hearing Examiner found that the proposed use, as represented in the Conditional Use Plan (Exhibits 46 and 37(b) – (l)), will meet all the criteria specified in the Zoning Ordinance. More specifically, it will be compatible with the neighborhood; it will be consistent with the goals of the applicable Master Plan; it will not have undue adverse effects on the neighbors; it will comply with development standards; and it will not harm the environment. Therefore, the Hearing Examiner approved the conditional use pursuant to Section 59.3.3.2.C.2.b. of the 2014 Zoning Ordinance, subject to the conditions listed in Part IV of his January 25, 2017 Report and Decision.

By letter dated June 5, 2019 (Exhibit 47), as corrected by her letter and email of June 6, 2019 (Exhibits 50 and 50(a)), counsel for the conditional use holder, Parkview at Aspen Hill, LLLP, requested that the Hearing Examiner approve a minor amendment of the conditional use by administratively modifying the Conditional Use Plans to allow installation of “a permanent zinc coated steel fence along the southern perimeter of the site.” Exhibit 50. The Applicant’s proposed revised plans are labelled Exhibits 47(b), (c) and (d)).

## II. The Basis for the Modification Request

Patricia A. Harris, Esquire, the attorney for the Conditional Use Holder, outlined the reasons for the request in her corrected letter of June 6, 2019 (Exhibit 50):<sup>2</sup>

On behalf of Parkview at Aspen Hill, LLLP (the "**Applicant**"), we respectfully request a minor amendment to conditional use case No. CU 17-04 (the "**Conditional Use**") to install a permanent zinc coated steel fence along the southern perimeter of the site. The Applicant requests this minor revision pursuant to Chapter 59 of the Montgomery County Code (hereinafter the "**Zoning Ordinance**"), Section 7.3.1.K.2.a. A Minor Amendment is appropriate given the insignificance of the proposed change relative to the underlying conditional use.

The property that is subject to the Conditional Use consists of a 5.68 acre property ( $\pm$  247,256 square feet), identified as part of Parcel P776 on Tax Map HR 53, and located at 3132 Bel Pre Road Aspen Hill, Maryland (the "**Property**"). By opinion dated January 25, 2017, the Hearing Examiner approved the Conditional Use, subject to conditions, which permits the Applicant to build and operate an Independent Living Facility for Seniors or Persons with Disabilities (hereinafter referred to as the "**Project**"). Following the Conditional Use approval, on February 27, 2017, the Applicant obtained preliminary plan approval to create three lots and proceed with the development of the Independent Living Facility. Development of the Project began shortly thereafter and the Applicant expects to complete the Project this September and commence occupancy in October.

Now, the Applicant is submitting this application for a Minor Amendment in order to improve the safety of the Property and strengthen the identity of the Project. The proposed improvement involves the installation of an approximately 476-linear foot zinc coated steel painted black fence along the southern perimeter of the Property. The fence will have a uniform height of approximately 6 feet. This permanent fence will serve three distinct purposes, as follows:

1. **Protect** – The three-rail steel picket fence will act as a secure barrier that will defend the Property against trespassers and other unauthorized visitors. This added protection along the southern border is important given the vulnerability of the Project's residents.
2. **Distinguish** – The protective fence will also help to distinguish the Independent Living Facility from other improvements on the Property (i.e., the existing church and detached house), as well as other nearby residential uses.
3. **Enhance** – The zinc coated steel painted black fence will also subtly enhance the visual appeal of the Project site.

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<sup>2</sup> The Applicant corrected the reference to an aluminum fence in her original letter (Exhibit 47) in response to an inquiry from the Hearing Examiner (Exhibit 49). All references to the proposed fence in the corrected letter are to a zinc-coated steel fence, painted black (Exhibits 50 and 50(a)).

Pursuant to Section 7.3.1.K.2.a. of the Zoning Ordinance, "a minor amendment to a conditional use is one that does not change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use." The proposed fence satisfies this criteria; the underlying Conditional Use will remain unchanged, and the proposed fence will have no impact on surrounding uses or existing traffic levels. If anything, the fence will contribute positively to the immediate area because it will further secure the Property and improve the aesthetic appeal of the Project.

For the reasons stated herein, we respectfully request that the Hearing Examiner administratively approve this Minor Amendment, as provided for by the Zoning Ordinance. We have enclosed an application fee of \$1,920, a list of the adjoining and confronting property owners, mailing labels, and a redline plan indicating the location of the fence and design details.

### **III. The Governing Law**

Requests to amend a conditional use are governed by Zoning Ordinance §59.7.3.1.K.

Whether an amendment request is characterized as one for a major amendment or for a minor amendment is significant because a *major amendment* application must “*follow[] the same procedures, must meet the same criteria, and must satisfy the same requirements as the original conditional use application . . .*” Zoning Ordinance §59.7.3.1.K.1.b. However, an application for a *minor amendment* need not go through those extensive procedures. Rather, “. . . *it may be approved administratively by the Hearing Examiner.*” Zoning Ordinance §59.7.3.1.K.2.a.

Zoning Ordinance Section 59.7.3.1.K. also defines major and minor amendments:

§59.7.3.1.K.1.a. *A major amendment to a conditional use is one that changes the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use.*

§59.7.3.1.K.2.a. *A minor amendment to a conditional use is one that does not change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use.*

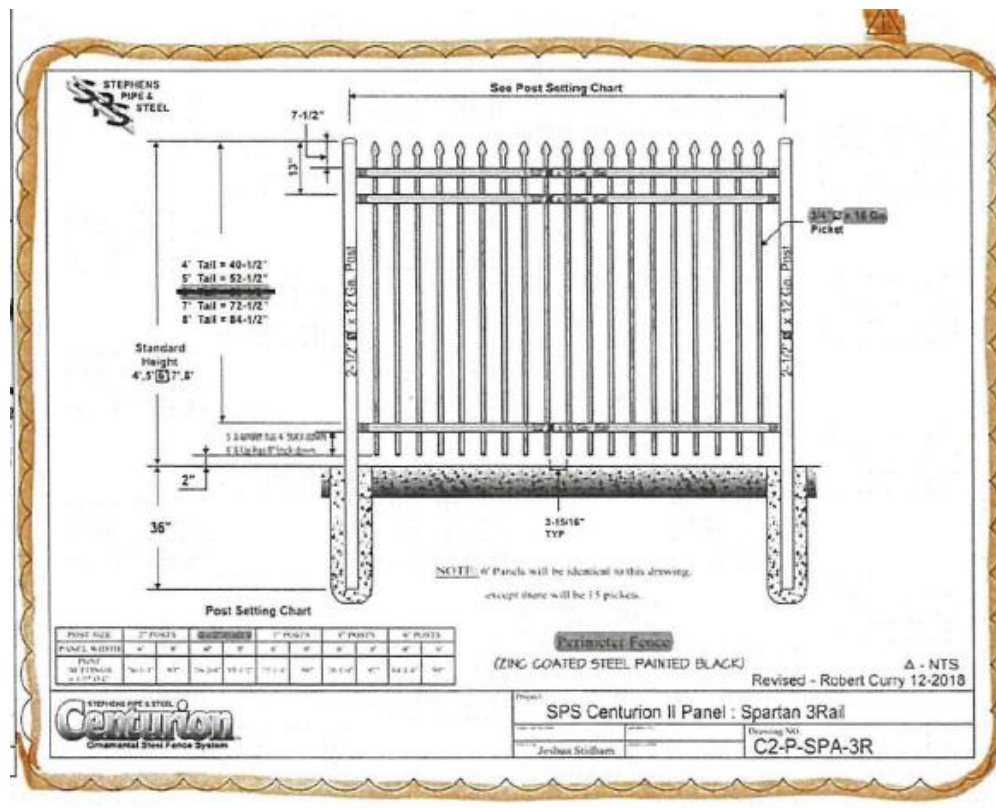
Whether an application to amend a conditional use is characterized as a major amendment or a minor amendment, the County Council has made it clear that the request to

amend a conditional use must be filed with the Hearing Examiner, and not the Board of Appeals.<sup>3</sup> See Zoning Text Amendment (ZTA) 16-16, (Ord. No. 18-25, eff. 2/27/17), which amended Zoning Ordinance §59.7.3.1.K. to clarify jurisdiction over applications to amend conditional uses and special exceptions. Thus, the Hearing Examiner has the jurisdiction to act on the Applicant's request for a minor amendment of the conditional use in question.

#### IV. Evaluation and Decision

The proposed new zinc-coated steel fence is shown on Applicant's amended "Landscape Plan Details" (Exhibit 47(d)), the relevant portions of which are reproduced below:

16-4-19	ADDED 6" PERIMETER FENCE ALONG SOUTHERN PROPERTY LINE		
12-6-17	FINAL CONSTRUCTION SET		
9-20-17	REVISED BID SET	JW	
5-22-17	REVISED COA COMMITMENT SET		
4-27-17	BUILDING PERMIT SUBMISSION	EWM	TMR
1-27-17	COA COMMITMENT SET	JW	
12-16-16	REVISED PROPERTY LINE LOT 1	EWM	
DATE	REVISION	BY	APPR.

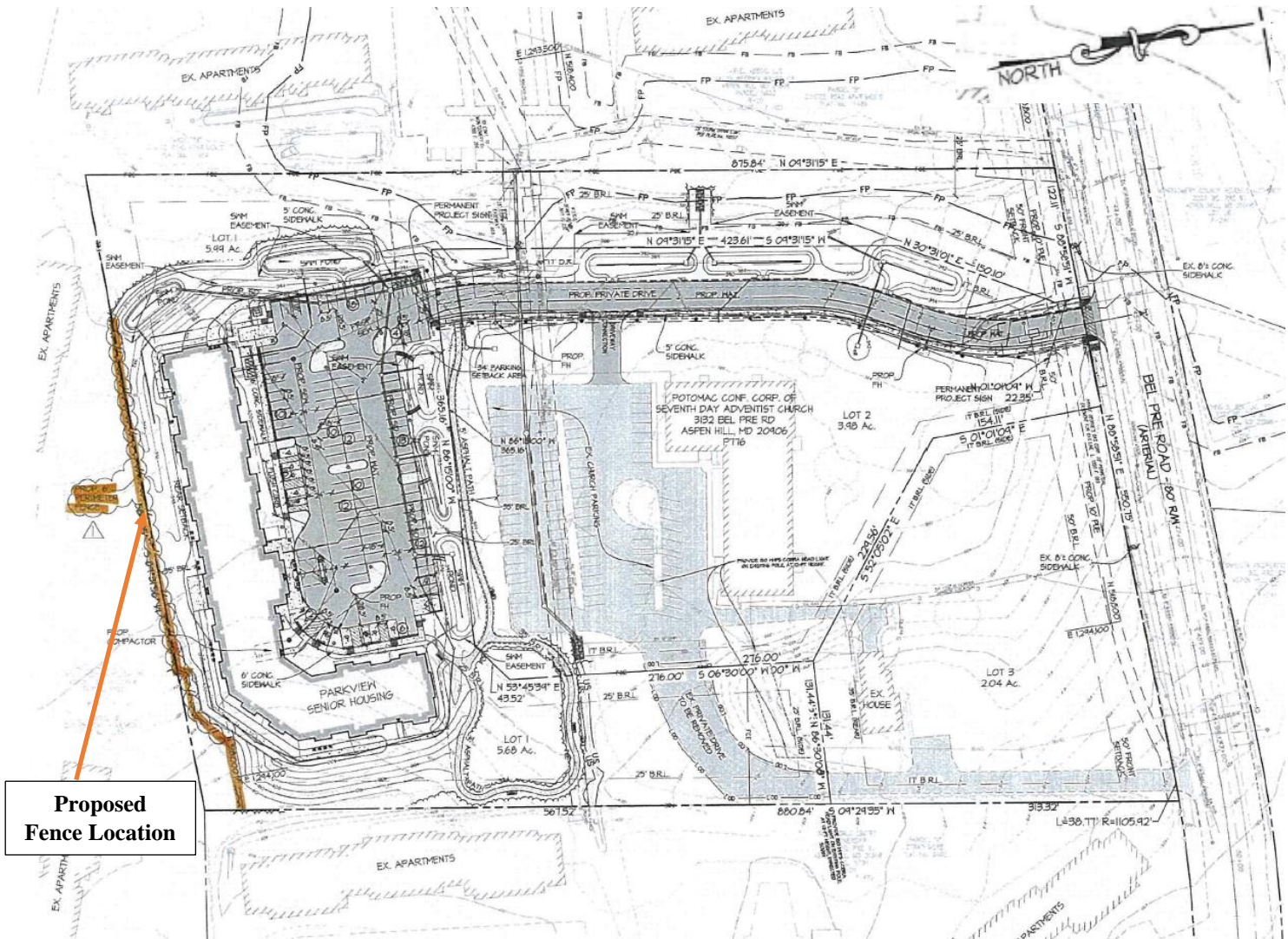


<sup>3</sup> The opposite is true with requests to modify special exceptions. They must be filed with the Board of Appeals.



The proposed location of the new fence is shown on the amended Conditional Use Overall Site Plan (Exhibit 47(b)) and the amended Conditional Use Site Plan (Exhibit 47(c)).

The relevant portion of the Overall Site Plan is reproduced below, followed by the Conditional Use Site Plan:



6-4-19	ADDED 6' PERIMETER FENCE ALONG SOUTHERN PROPERTY LINE		
12-8-17	FINAL CONSTRUCTION SET		
9-20-17	REVISED BID SET	JW	
5-22-17	REVISED CDA COMMITMENT SET		
4-27-17	BUILDING PERMIT SUBMISSION	EWM	TMR
1-27-17	CDA COMMITMENT SET	JW	
12-16-16	REVISED PROPERTY LINE LOT 1		
DATE	REVISION	BY	APP'R.

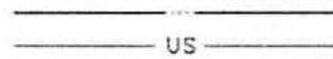
## LEGEND



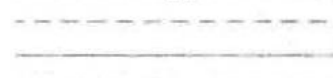
EX. CONTOURS  
PROP. CONTOURS



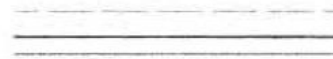
EX. BUILDING  
PROP. BUILDING



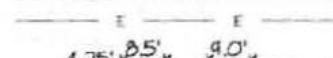
EX. STREAM  
EX. WATERS OF THE U.S.



EX. CURB  
PROPOSED CURB



EX. SIDEWALK  
PROPOSED SIDEWALK



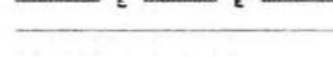
EX. ELECTRIC



CAR SHARE SPACES  
SPACE READY TO BE CONVERTED TO A  
STATION FOR ELECTRIC CHARGING VEHICLE  
CURB STOPS



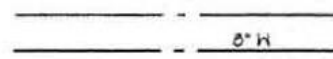
MOTORCYCLE SPACES



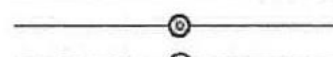
PROPOSED ELECTRIC  
EX. GAS



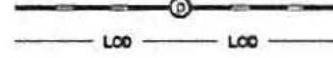
EX. SAN  
PROPOSED SAN



EX. WATER  
PROPOSED WATER



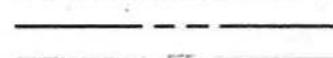
EX. STORM DRAIN  
PROPOSED STORM DRAIN



PROPOSED LOD  
REMOVED PROPERTY LINE



EX. PROPERTY LINE  
PROPOSED PROPERTY LINE



FOREST CONSERVATION



AFFORESTATION AREA  
SEE PRELIMINARY FCP



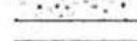
TREE SAVE AREA  
SEE PRELIMINARY FCP



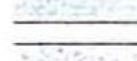
TREE SAVE AREA  
AFFORESTATION/INVASIVE  
SPECIES MGMT  
CATEGORY I



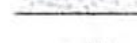
PROPOSED PAVEMENT



SIDEWALK



EX. PAVEMENT

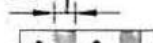


ASPHALT PATH



PROP. LIGHT

RAMP  
(SLOPE 7.5 % MAX)  
MIN LENGTH = 6'-8"



HC RAMP  
SEE DETAILS ON SHEET 5

5'X5' LANDING  
MAX. 15% EA. WAY

RAMP  
(SLOPE 7.5 % MAX)  
MIN LENGTH = 6'-8"



5'X5' LANDING  
MAX. 15% EA. WAY

HC RAMP  
SEE DETAILS ON SHEET 5

5'X5' LANDING  
MAX. 15% EA. WAY

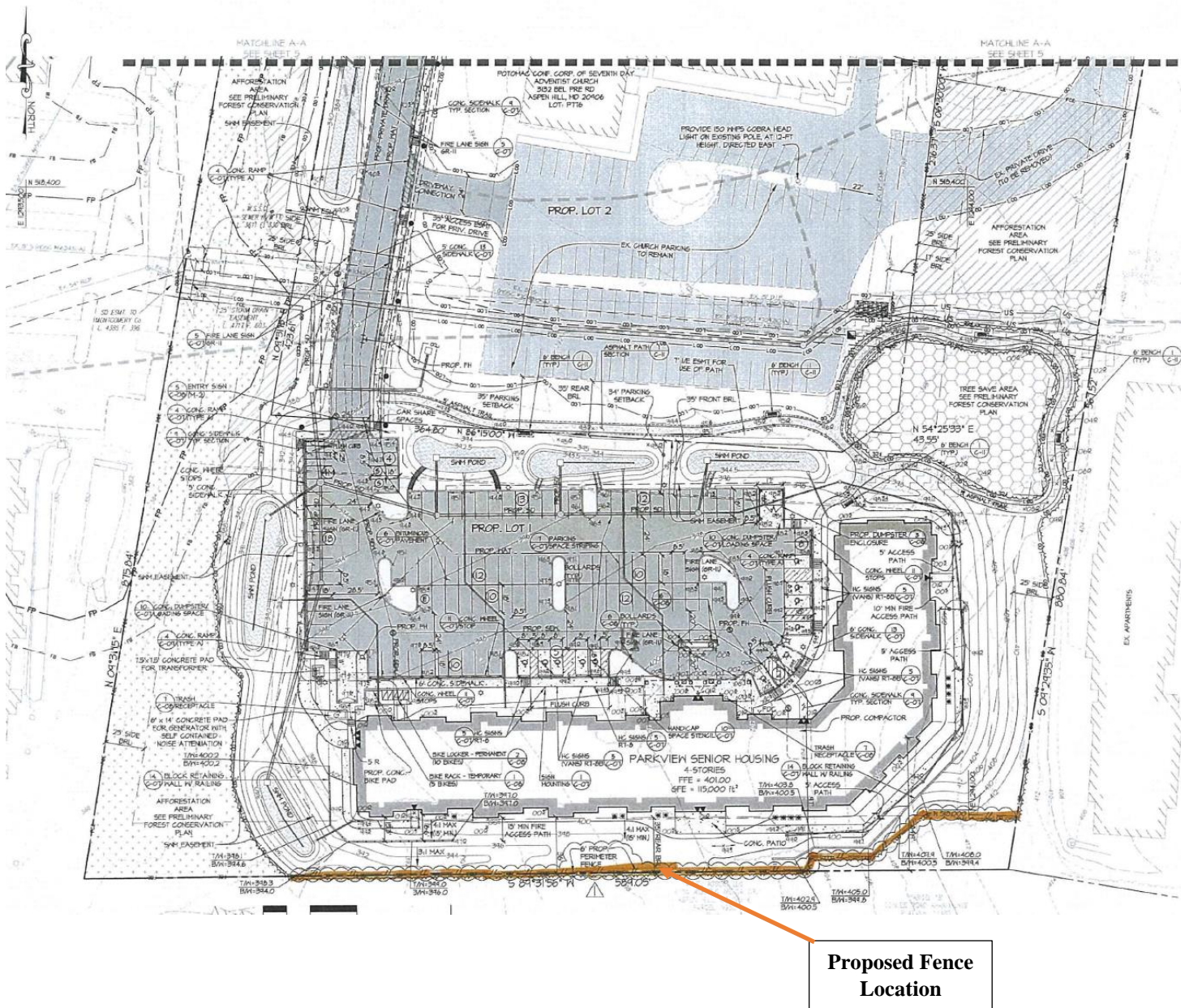


PROP. BENCH

## EXISTING UTILITY NOTES

1. For marking locations of existing utilities, notify "MISS UTILITY" at 1-800-257-7777, 48 hours prior to any excavation or construction.
2. Information concerning underground utilities was obtained from available records. The contractor must determine the exact locations and elevations of the utilities by digging test pits by hand at all utility crossings well in advance of trenching. If clearances are less than specified on this plan or less than 12 inches when not specified, contact the Engineer, and the owner of the other involved utility before proceeding with construction.
3. For field location of gas line services, notify Washington Gas Light Co., 703-750-1000, 48 hours prior to the start of any excavation or construction.
4. Omissions and/or additions of utilities found during construction shall be the sole responsibility of any contractor engaged in excavation at this site. Outschick, Little & Weber, P.A., shall be notified immediately of any and all utility information, omissions and additions found by any contractor.
5. Due to the proximity of live underground and overhead utilities, we are not responsible for any damage or injury sustained during construction by any persons, trucks, trailers, or equipment used on or adjacent to the site.





The definitional distinction between a major and minor amendment is whether the proposal, if granted, would “change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use. Under the facts of this case, the Hearing Examiner finds that the proposed change would clearly not change the nature or character of the use. It would still be operating as an Independent Living Facility for



Seniors or Persons with Disabilities, consisting of 120 dwelling units. No additional traffic, parking, staffing or operational changes are requested. The only proposed change is the addition of a fence on the southern border. One would not reasonably expect substantial adverse effects on the surrounding neighborhood just by adding a fence of the size that is permitted by the Zoning Ordinance in a residential area.

There is also no evidence in the factual record compiled by the Hearing Examiner to demonstrate that the addition of the proposed fence would be a significant issue for the neighborhood. The Hearing Examiner inquired of the Planning Department's Technical Staff as to whether the proposed minor amendment would raise any concerns, and Staff responded that it would not create any concerns. Exhibit 51. Based on this record, the Hearing Examiner agrees with Ms. Harris that the addition of the proposed fence would have little if any adverse impact on the neighborhood.

The Hearing Examiner concludes that the proposed modification is properly characterized as a minor amendment – one which will not change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use. Thus, the statutory standard for an administrative modification to allow a minor amendment is satisfied, and it is hereby approved without a public hearing, subject to reconsideration if a request for a hearing is received in accordance with the provisions of this Order.

The Hearing Examiner hastens to add that this ruling does not address whether or not the conditional use holder must obtain any further authorization from any other agency to install the proposed fence. The Hearing Examiner holds only that the terms of the conditional use, as amended by this Order, do not prohibit the fence now proposed by the conditional use holder.

**ORDER**

Based on the foregoing, it is, this 14<sup>th</sup> day of June, 2019:

**ORDERED:** That the request for a minor amendment to Conditional Use CU 17-04, allowing the zinc coated steel fence depicted in Exhibits 47(b), (c) and (d) to be added to the site at the location specified in the Amended Conditional Use Site Plans (Exhibit 47(b) and (c)), is hereby administratively **APPROVED**, under the terms of the 15 Conditions set forth in Part IV of the Hearing Examiner's Report and Decision of January 25, 2017; and, it is

**FURTHER ORDERED:** That this amendment and the continued use of the conditional use are subject to all terms and conditions imposed in connection with the initial approval, except as specifically amended by the Hearing Examiner in this Opinion and Order. The Conditional Use holder is directed to comply fully with all applicable county, state and federal regulations; and, it is

**FURTHER ORDERED:** That pursuant to Section 59.7.3.1.K.2.b. of the Zoning Ordinance, any party may request a public hearing on the Hearing Examiner's action within 15 days after this decision is issued. The request for public hearing must be in writing, and must specify the reason for the request and the nature of the objection or relief desired. If a request for a hearing is received, the Hearing Examiner must suspend his administrative amendment and conduct a public hearing to consider whether the amendment substantially changes the nature, character, or intensity of the conditional use or its effect on the immediate neighborhood. If the Hearing Examiner determines that such impacts are likely, then the amendment application must be treated as a major amendment application. A decision of the Hearing Examiner may be appealed on the basis of the Hearing Examiner's record to the Board of Appeals.



Martin L. Grossman  
Hearing Examiner

NOTICES TO:

Patricia Harris, Esquire, Applicant's attorney  
Parkview at Aspen Hill, LLLP, Applicant  
c/o Ivy Dench-Carter  
Barbara Jay, Executive Director  
Montgomery County Board of Appeals  
Emily Tettelbaum, Planning Department  
Ehsan Motazed, Division of Zoning & Site Plan Enforcement  
Department of Permitting Services  
Alexandre A. Espinosa, Director, Finance Department  
Current abutting and confronting property owners  
All parties entitled to notice at the time of the original filing:  
Abutting and Confronting Property Owners  
(or a condominium's council of unit owners or renters, if applicable)  
Civic, Renters' and Homeowners' Associations within a half mile of the site  
Any Municipality within a half mile of the site